Petition

81-464

No.....

Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1981

—o—

PAUL vox MINDEN, Former Federal Scientist,
Petitioner,

vs.

NUWES, an Agency of the United States government, Department of the Navy,
Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

PAUL vox MINDEN, Pro Se
Box 4636, Rolling Bay,
Washington 98061

QUESTION PRESENTED

Whether federal appeals court erred in application of 5 U.S.C. 7703, To Wit:

1. Whether the petitioner possesses right under 1st and 14th Amendments to choose from multiple potential processes under the law (7703(c) vs. 7703(b)(2)): whether this choice once expressed constitutes jurisdiction, enforceable in each court, allowing District Court to act remanding this cause under Rule 60, of F.R.Civ.P.

2. Whether by transferring this case, the federal appeals court denied due process under the law, of the case filed re: "In any case filed...court shall review".

3. Whether within context of adjudicating employee, under 7703(c), Judicial Review can address discrimination andotherissues directed at showing undeniable bad faith on the part of Agency's representatives.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—————o—————

Petitioner, PAUL von MINDEN, on behalf of federal employees everywhere, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of United States Court of Appeals for Ninth Circuit, entered in this proceeding on May 20,1981.

OPINION BELOW

The order filed on April 30,1981 renders the opinion of the United States Court of Appeals for the Ninth Circuit: contained herein as Appendix, Exhibit A.

The subsequent orders include:

(1) Exhibit B, Federal Appeals Court order of May 20, 1981 denying reconsideration.

(2) Federal Appeals Court order of June 23, 1981, denying Stay to submit Writ.

(3) Exhibit C, District Court order of August 7, 1981 dismissing the case.

The prior Administrative ruling:

(1) February 6, 1980, NUWES agency ruling.

(2) June 27, 1980, Initial Merit System Protection Board ruling.

(3) October 30, 1980, Final Merit System Protection Board ruling.

JURISDICTION

Originating from the orders of the United States Court of Appeals for the Ninth Circuit, Federal District Court for the Western District of Washington ruled to dismiss this case.

Wherefore petitioner submits, for review by certiorari the orders of the Federal Appeals Court, with jurisdiction premised upon 28 U.S.C. section 1254(1).

The Appeal Court on June 23, 1981 denied petitioner's request for a Stay to petition for review by certiorari. Record in this cause was lodged with the Clerk of the United States District Court for the Western District of Washington.

This Federal District Court within the past ten days dismissed the case in lieu of demanding for judicial review, as moved by petitioner under jurisdiction of Rule 60, Fed. R. Civ. P.,to correct error

of docketing and calling for pretrial order in an action (Case of Discrimination) which the petitioner did not file and stated will no prosecute, at this time.

Alternate jurisdiction for reviewing this cause, arises from the District Court order, premised upon Direct Appeal from Decision Invalidating an act of Congress, 28 U.S.C. 1252; by depriving employees of the government the right of judicial review under 5 U.S.C. 7703(c). The District Court order resulted from federal appeals court order for which seek review by certiorari.

The United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals for the Ninth Circuit regardless of the states of the mandate. Carr v. Zaja, 283 U.S. 52, 53 (1931); Aetna Casualty Co. v. Flowers, 330 U.S. 464, 468 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendment to the United States Constitution, and 29 U.S.C. 633a Law on Age Discrimination, and 5 U.S.C. 7703, basis for federal jurisdiction in the court of first instance, are set forth in the Appendix as part of Exhibit D.

STATEMENT OF THE CASE

Introduction.

In this description the petitioner starts at the point where the case left the administrative review process and entered the courts. After presenting the jurisdictional points which form a basis for courts decisions, will first review the merits of the case as appealed to the Agency (NUWES) and the Merit System Prot-

ection Board (Board), giving the reader a perspective on the occurrence encountered by the petitioner and subsequent impact on motions and corresponding court orders. The Statement of the Case then addresses this cause as brought before the courts.

Basis for Federal Jurisdiction in the Court of first instance.

The decision of the Board as shown on page 363 Part I of the administrative record, stated right to appeal:
(1) File a civil action under anti-discrimination law in any appropriate federal District Court. Petitioner did not do so.
(2) Petition of Judicial Review must be filed in appropriate U.S.Court of Appeals ...no later than 30 days after receipt of the Board's final decision. Timely mailed Petition For Review to U.S. Appeals Court stating, filed in accordance with 5 U.S.C. 7703, seeking review of adverse actions.

Exhibit D of Appendix, contains the statute giving the U.S. Appeals Court the jurisdiction to accept and rule on cause.

The relief sought as stated in the Opening Brief submitted in the appeal on April 16, 1981, asks for Agency's ruling to be overturned and claim of recompense be granted in conjunctive agreement with the United States Atorney General.

On The Merits of The Agency's Action.

The case as presented at various levels contains two parts. First, that employee acted in an exemplary and professional fashion both refuting the Agency allegations and showing this by positive documented facts. Second, the counter-claim that representatives of the Agency acted in bad faith, as categorized by :
BFL - Bad Faith violations of the law,
BFP - Bad Faith improper procedures,

BFA - Bad Faith arbitrary decisions,

BFC - Bad Faith capriciousness,

BFI - Bad Faith coloring of information,

BFQ - Bad Faith evading questions.

The Agency seemed to attempt to paint a picture of a do nothing employee. However, when the employee pointed out that each month a 40-50 page report was produced, in addition to other work, the Agency then tried to deny that this was valid work. Also attempted this image making in testimony before the Board and is awarded the BFI - Bad Faith Coloring of Information as described on page 8 of the Opening Brief, submitted to the United States Court of Appeals on April 16, 1981. The following additional examples document Bad Faith conducted during the appeal process and Bad Faith during employment at the Agency.

(1) Lack of Impartiality. The same person responsibility for the work violations is also the same person, who took the adverse action against the employee, in violation of Title 5 CFR part 735.101 page 361 and Title 5 CFR part 735.201 page 363 stating:

> "An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in or create the appearance of ...(d) losing complete independence or impartiality."

See Part I page 289 of administrative record which documents this fact.

(2) Evasion of Questions. On April 22, 1980 sent a letter to the Agency, asking for an answer that was fundamental to the preparation of the case. The question:

> "Answer yes or No to the following - Did unacceptable performance (as defined by law/regulation) constitute a reason for removal ?"

Did not receive the answer, however this violates Title 5 CFR part 737.27 page 391, Administrative proceeding (3) Adequate

Notice(ii), which states:

> "Notice to former Government employees must include (a) A statement of allegations (and the basis thereof) sufficient in detail to enable the Government Employee to prepare adequate defense."

See Part I page 290 of administrative record that documents this.

(3) Promissory Estopple. Agency agreed to provide witnesses, at administrative hearing, however sat by and said nothing when the Presiding Official ruled that employee could not call these people as witnesses, because they had already been cross-examined during Agency presentation. Information documenting this fact referenced on page 17 of Petitioner's Opening Brief submitted to Appeals Court.

(4) Fabricated Fact. In the first allegation of the Agency, that employee failed to return materials (foils - worth about ten dollars in 1979), Agency testimony

agrees, employee offered to replace. Then Agency testimony denying knowledge "that foils were lost" and hence impossible to return, was changed to "I don't remember" when reminding witness he was under oath. Information documenting facts referenced on page 9, Petitioner Opening Brief submitted to the Appeals Court, is cited as an example of abuse of authority, prohibited under title 5 U.S.C. 2302 (b)(8).

(5) Quasi Admission. Documented evidents compiled and referenced on page 13, of Petitioner's Opening brief submitted to the Appeals Court, illustrate violations of health law as locally enforced through NAVTORPSTAINST 5100.17 procedure.

(6) Government Owns The Concept. This statement along with, "not to peddle this to industry" illustrates Agency reaction to employee who developed concepts on his

own time and contributed them freely.

Title 5 CFR part 735.203 page 364 states:

> "Employees are encouraged to engage in teaching lecturing and writting that is not prohibited by law...i.e. (1) without compensation."

Under the Shop Right Rule - the employer, however is not entitled to a conveyance of the invention, this remains the right of the employee - inventor. (U.S. v. Dubilier Condenser Corp 289 U.S. 178,189,53 SCt 554, 558, 77L Ed 1114).

The Agency avoided any statement on the employees background until directed by the Board; while this submission shows the Voluntary Ignorance about the experience, skills and education of the employee; As documented on page 14 of Petitioner's opening Brief submitted to Appeals Court.

The actions as described above serve as a reference against which to measure events that subsequently occur in court.

Cause as Brought Before The Courts.

The Petition for Judicial Review became initiated after receipt of the final decision of the Merit System Protection Board (Board) on election day, November 4, 1980. The Board's guidelines for appeal showed that multiple alternatives existed as already presented under prior heading "Basis for Federal Jurisdiction in Court of First Instance". However the appellant chose to file a Petition For Review with the United States Court of Appeals for the Ninth Circuit in accordance with 5 U.S.C. 7703 and received a docket number 80-7664.

Initially the name of the respondent became changed to Merit System Protection Board and petitioner filed a motion and the Appeal Court corrected it to: NUWES, Department of the Navy. Initials NUWES designate - Naval Undersea Warfare

Engineering Station, located at Keyport, Washington 98345.

While preparing to submit the Opening Brief to Appeals Court, subsquently submitted on April 16, 1981, petitioner received a motion for Dismissal/Transfer on April 7, 1981. Filed a reply dated April 8, 1981 and a Petition For Reconsideration on May 7, 1981 which contained the following statement on page 3, under the heading "Petitioner's Intent":

> "At this time the petitioner will not prosecute the Agency through either Age Discrimination or some other statute in District Court or elsewhere. Rather the Petitioner will continue to follow the appeal process associated with the actions taken under Title 5 U.S.C. section 7701, See Title 5 U.S.C. section 7703."

The representatives for the Agency did not respond and the Appeal Court issued their order on May 20, 1981; Exhibit B of the Appendix. Transfer was ordered by the April 30, 1981 decision of the Court

see Appendix Exhibit A. Petitioner wrote Appeals Court on June 1, 1981:

> "Since the petitioner has already stated that the employee will not prosecute the Agency "Case of Discrimination" hence transfer for this purpose, within the current United States Court of Appeals interpretation of Title 5 U.S.C. 7703, leads the employee to petition the United States Supreme Court with a Writ".
>
> Further, "The employee makes this appeal (to the Court of Appeal, Ninth Circuit) as a matter of self-defense, under title 5 U.S.C. 7703(c).

After waiting for the Court of Appeals to reply, wrote an open letter to District Court for the Western District Washington on June 23, 1981, to convey the facts and state that the employee will not prosecute the case as transferred. Court of Appeals order denying a Stay for filing a Writ was received on June 25, 1981. The petitioner then waited for District Court to reply.

On July 20, 1981 opposing counsel filed a motion in District Court calling for dismissal. On July 27, 1981 District

Court issued a statement calling for a pretrial order to be lodged on or before April 5, 1982. Petitioner filed a reply to the motion for dismissal, moving the Court to act under Rule 60, F.R.Civ.P. to remand the case, recognizing the apparent resulting error: A case can not exist if someone does not file a complaint, Rule 3, F.R.Civ.P.

The Petitioner's consistent position throughout has been as expressed in the reply to the motion sent to District Court:

> "The employee did not, does not and will not file a complaint against the Agency pending review of the actions, findings and conclusions pursuant with 5 U.S.C. 7703(c). Appellant seeks judicial review to set aside the Agency actions and as appropriate declare the employee innocent."

The United States' District Court for the Western District of Washington ruled in the order received on August 11, 1981 to Dismiss this cause Without Prejudice.

Mailed this Writ on August 17,1981.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit decision to transfer the case is in conflict with:

(1) Merit System Protection Board appeals guidelines and United States Constitution that indicates the appellant has right to choose under what jurisdiction to file: either 7703(b)(2) or 7703(c).

(2) Constitutional right to due process under the law (5 U.S.C.7703(c)), which states: "In any case filed...court shall review the record and hold unlawful..."

(3) Constitutional right for redress of grievance and applying Rules of Evidence under jurisdiction of 5 U.S.C. 7703(c), to set aside Agency action by presenting information(including Age Discrimination) showing that Agency acted in Bad Faith.

Jurisdiction on Writ of Certiorari.

This case presents a significant and serious question of, whether acting for the United States Government representatives of the Agency NUWES can void Appellant's contract with the government to obtain as former federal employee, judicial review.

The federal courts stand as guardian in the balance of power, and must enforce appellant's right to file, obtain judicial review and not be jurisdictionally quashed regardless of what the respondent moves, while conforming to jurisdicational bounds defined by the law, and rules of the court.

Petition United States Supreme Court to review this Writ of Certiorari because courts acting under a new Civil Service Act of 1978, have been set adrift, so far departed from the accepted usual course of judicial proceeding as to call for exercise of this Court's power of supervision.

For example, how many cases have existed in which United States Court of Appeals transfers a case to a lower court. This places the Appeals Court in the position of original decision making, and after the District Court rules, of now acting in its "normal" Appellant Jurisdiction. This seems like a potentially confusing situation that potentially lacks some impartiality.

Further, that since Civil Service Reform Act of 1978 is so new, that it is understandable that questions of this nature have not occurred before and hence the federal appeals court has decided an important question of federal law which has not been, but should be settled by this court.

The process that occurred, make the choice for where to file for the petitioner and transfer it to a jurisdiction in which

petitioner will not prosecute, then dismiss the cause, seems like a judicial process due for review.

Legislative History, Civil Service Reform Act of 1978, see Appendix page App. 9.

A major intent of channeling most appeal cases coming from administrative agency proceedings to the Court of Appeals rather than going to District Court as prior, was to consolidate and generate more consistent opinion.

However because of the nature of Discrimination cases needing more fact finding "Cases of Discrimination" were exempt from the general requirement of filing with the Court of Appeals or Court of Claims. However, expressio unius exclusio alterius, (maximum of law that words of exemption are not to be construed to import any liability). The interpretation based on legislative history is to

provide an option, like that expressed by the Merit System Protection Board appeal guidelines, either file civil action or file for judicial review. In the quote from page 56 of volume four, see App. 9 in Appendix, The legislative history did record the difference between raising Discrimination law as a defense or answer to agency action, versus filing a separate complaint. Hence precedent would indicate that Age Discrimination information can be called upon to support either civil action filed under jurisdiction of 5 U.S.C.7703(b)(2), and entered in District Court, or for judicial review filed under jurisdiction of 5 U.S.C. 7703(c) and entered in Court of Appeals.

The question then remains what is the definition of a Case of Discrimination. As rule 3, of Fed. R. Civ. P indicates:

"A civil action is commenced by filing a complaint with the court."

The complaint filed in District Court transforms a cause into a case. Hence a Case of Discrimination only exists when a complaint is filed.

Petitioner seeks judicial review and did not, does not will not file complaint.

In the courts the Agency representatives alleged the appellant filed a complaint, hence this cause constituted a "Case of Discrimination" and thus lacked jurisdiction in Court of Appeals and should be (1) dismissed, (2) transferred to District Court, (3) Appellant should drop his complaint eliminating the Age Discrimination issue, then this case would be properly filed before the Court of Appeals.

When the alleged "Case of Discrimination" was transferred to District Court the cause was dismissed, since no complaint was filed. With naked truth, the dismissal from District Court, illustrates that a

Case of Discrimination refers to the filing of a complaint against the Agency under Age Discrimination law, seeking to show Agency acted in that way and hence obtain equitable relief, see Age Discrimination law App. 8 in the Appendix.

Rather the petitioner seek judicial review to set aside Agency Action on the merits of what occurred.. Based on the case precedent of Knott v. United States, 128Ct. Cl.489,121 F.Supp 630 (1954). petitioner's case depends on showing that the representatives of the Agency acted in bad faith.

The illustrations of Bad Faith given in the Statement of the Case, show that indeed this case should be given a judicial review and also explainswhy the representatives of the Agency have sought to side track and dismiss this case.

In addition to prior stated reasons ask the Court to grant a Writ of Certiorari

to prevent this case, as it now stands from becoming and serving as a precedent for future judicial dismissal, instead of judicial reviews.

To error is human.

Linguisticly read 5 U.S.C. 7703(c) as conveying the right to have the facts subject to trial de novo by the reviewing court, i.e. Court of Appeals. However on June 4, 1981 in talking to a Washington D.C. lawyer, was informed that Court of Appeals does not conduct trials. However am still puzzled by the inclusion of that statement in paragraph (c) when it now appears more applicable to paragraph(b)(2).

In recognizing that people do not like to be informed of their error or admit them, pray that the court take this into consideration in its deliberations.

The relief sought by the petitioner asks for no person to suffer rather to

to set aside an improper adverse action promulgated by the Agency NUWES, and grant a claim of recompense in conjunctive agreement with the United States Attorney General. I contribute this Writ in hopes that it will safeguard the rights of federal employees everywhere

The right to petition for redress in the First Amendment and equal protection under the law in the Fourteenth Amendment of the United States Constitution, depend ultimately on acting in good faith. If examples of bad faith are allowed to grow through not correcting "error or not" the law will erode.

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CONCLUSION

For the aforesaid reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeal for the Ninth Circuit.

———o———

Respectfully submitted,

PAUL von MINDEN, Pro Se

Box 4636 Rolling Bay, Washington 98061-0636

telephone (206) 842-1329
innovators international

August 17, 1981

Addresses to which copies were sent for the opposing parties are included in Appendix App. 10

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

San Francisco, California 94101

Before
Hon. Eugene A. Wright, Circuit Judge
Hon. Anthony M. Kennedy, Circuit Judge

Filed: April 30,1981

PAUL von MINDEN,
Petitioner,

No. 80-7664 vs.

NUWES, Department of the Navy,
Respondent.

Appeal from the Merit System Protection Board, identification number SE075209080

O R D E R

Upon due consideration of respondent's motion to dismiss or transfer this

action and of petitioner's response thereto, we conclude that this court does not have jurisdiction to consider the petition for review. Because petitioner presents a claim under the Age Discrimination in Employment Act of 1967, this case falls within the coverage of 5 U.S.C. 7702. If judicial review is to proceed, it must begin with the filing of an action in the appropriate United States District Court pursuant to 29 U.S.C. 633a(c).
See 5 U.S.C. 7703(b)(2).

Thus, it is hereby ordered that the clerk of this court transfer this action to the United States District Court for the Western District of Washington.

App. 3

EXHIBIT B

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

San Francisco, California 94101

Before
Hon. Eugene A. Wright, Circuit Judge
Hon. Anthony M. Kennedy, Circuit Judge

Filed: May 20,1981

PAUL von MINDEN,
Petitioner,

No. 80-7664 vs.

NUWES, Department of the Navy,
Respondent.

O R D E R

Petitioner's petition for reconsideration of this court's order of April 30, 1981 is denied. 5 U.S.C. 7701(c)(2)(B) defines the scope of review when an administrative appeal is taken to the Merit Systems Protection Board. Our jurisdiction is determined by reference to 5 U.S.C. 7703(b)(2), which requires that this action be transferred to the district court.

App. 4

EXHIBIT C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

Seattle, Washington 98104

Before
Hon. Donald S. Voorhees, District Judge

August 7, 1981

PAUL von MINDEN,
Petitioner

No. C81-646V vs.

NUWES, Department of the Navy,
Respondent.

Transferred from United States Court of Appeals for the Ninth Circuit, No. 80-7664

O R D E R

Having considered the motion of defendant, together with the memorandum filed by counsel and the affidavit filed by petitioner pro se, the Court now finds and rules as follows:

1. Service upon respondent has not been accomplished in accordance with F.R.Civ.P. 4(d)(4) and (5). Petitioner's affidavit

seems to indicate that such failure to make service was deliberate, it being his desire to proceed in the Court of Appeals. Absent such service, the Court has no jurisdiction over the respondent, and this cause must be dismissed.

2. Petitioner has requested that this Court "remand" this cause to the Court of Appeals. The Court has no jurisdiction to do so.

Accordingly, the motion of defendant is GRANTED. This cause is DISMISSED WITHOUT PREJUDICE.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 7th day of August, 1981.

EXHIBIT D

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press: or the right of the people peaceably to assembly, and to petition the Government for a redress of grievance.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life,

liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Title 5 U.S.C. section 7703
Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit System Protection Board may obtain judicial review of the order or decision.

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusions found to be --

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule or regulation having been followed: or

(3) unsupported by substantial evidence: ...

Title 29 U.S.C. 633a
Nondiscrimination on account of age in Federal Government employment.

(a) All personnel actions affecting employees ... shall be made free from any discrimination based on age.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purpose of this chapter.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

U.S.Code and Congressional and Administrative News; Legislative History P.L. 95-454, Civil Service Reform Act of 1978

Volume four page 56

The Board has jurisdiction whether the employee raises the discrimination laws as a defense or answer to the agency action, or whether the employee files a separate complaint against his employer under the anti-discrimination laws for proposing to take appealable action against him.

Volume four page 63

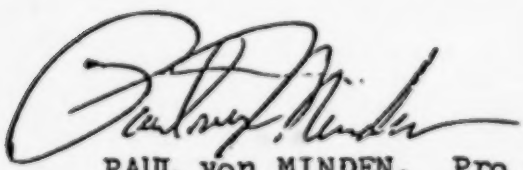
...providing that Board decisions and orders(other than those involving discrimination complaints ...) be reviewable by ...U.S.Courts of Appeals...
The section therefore exempts from the general requirement that employees appeal to the Court of Appeals or Court of Claims those suits brought pursuant to the anti-discrimination laws.

AFFIDAVIT OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that in accordance with Rule 28.4.(a) of UNITED STATES SUPREME COURT, that I mailed a copy of the foregoing document to which this certificate is attached, to:

(1) Solicitor General, Department of Justice, Washington D.C. 20530

(2) Ronald L. McFall, Management Representative, Naval Undersea Warfare Engineering Station, Department of the Navy, Keyport, Washington 98345



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AUGUST 17, 1981

Appendix

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APPENDIX

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Washington 98061
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In The

Supreme Court of the United States

October Term, 1981

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PAUL von MINDEN, Former Federal Scientist,
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NUWES, an Agency of the United States government, Department of the Navy,
Respondent.

———o———

APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

———o———

Petitioner, PAUL von MINDEN, in accordance with S.Ct. rule 21.1 (k) ii and iv hereby separately presents additional Appendix of records cited in the Writ of Certiorari submitted in this cause on August 17,1981, stating prior appeal rights at each level.

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EXHIBIT E

UNITED STATES OF AMERICA

MERIT SYSTEM PROTECTION BOARD

Washington D.C. 20419

Dated: October 30, 1980

PAUL von MINDEN,
Petitioner,

No. SE075209080 vs.

DEPARTMENT OF THE NAVY,
Respondent.

O R D E R

The Board, having fully considered appellant's petition for review of the initial decision issued on June 27,1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.

This is the final order of the Merit System Protection Board in this Appeal. The initial decision shall

become final five days from the date of this order. 5 C.F.R.1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

October 30, 1980 Robert E. Taylor

Washington D.C. Secretary

EXHIBIT F

UNITED STATES OF AMERICA

MERIT SYSTEM PROTECTION BOARD

Washington D.C., 20419

Dated: June 27, 1980

PAUL VON MINDEN

No. SE075209080 vs.

DEPARTMENT OF THE NAVY

Initial Order, Part I page 363 of the Administrative Record, pertaining to the right to appeal final order.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination. Such a petition must be filed with the Equal Employment Opportunity Commission, Office of Review and Appeals, 2401 E St., N.W.,Washington D.C. 20506.

The appellant also has the right to file a civil action under the anti-discrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S.District Court must be filed no later than 30 days after the appellant's receipt of final decision.

Except to actions filed under the anti-discrimination laws, a petition for judicial review of a final Board decision must be filed in the appropriate U.S. Court of Appeals or in the U.S.Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

Joseph H. Hartman

Presiding Official

EXHIBIT G

DEPARTMENT OF THE NAVY

Naval Undersea Warfare Engineering Station, Keyport, Washington, 98345

Dated February 6, 1980

To: Paul von Minden

From: Rodney L. Mash

Subject: Notice of Proposed Removal: FINAL DECISION

From Part I page 220 of the Administrative Record, pertaining to the right to appeal this final decision, contained in paragraph six.

In accordance with reference (a)-(FPM-CMMI 752)-, you may appeal this action to the Merit System Protection Board. Your appeal should be addressed to the Chief Appeals Officier, Merit Systems Protection Board, Seattle Region, 915 Second Avenue, Seattle, Washington

98147. You may appeal any time after receipt of this decision, but no later than 20 days after the effective date of this action. Enclosure (2) is the appropriate form for filing an appeal.

EXHIBIT H

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

San Francisco, California 94101

Before
Hon. Eugene A. Wright, Circuit Judge
Hon. Anthony M. Kennedy, Circuit Judge

Filed: June 23, 1981

PAUL von MINDEN,
Petitioner,

No. 80-7664 vs.

NUWES, Department of the Navy,
Respondent.

O R D E R

Petitioner's motion for stay of mandate pending application to the United States Supreme Court for Writ of Certiorari is denied.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 19 1981
ALEXANDER L. STEVAS
CLERK

No. 81-464

In the Supreme Court of the United States

OCTOBER TERM, 1981

PAUL VON MINDEN, PETITIONER

v.

NUWES, DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Merit Systems Protection Board in a case involving claims of age discrimination is subject to initial review in the courts of appeals.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1981 (Pet. App. 1-2) and a petition for rehearing was denied on May 20, 1981 (Pet. App. 3). The petition for a writ of certiorari was filed on August 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was removed from employment with the Naval Undersea Warfare Engineering Station (NUWES), Department of the Navy, for continued failure to carry out the work orders and instructions of his supervisor (AR II 5).[1] Petitioner sought review of this action before the Merit Systems Protection Board pursuant to 5 U.S.C. (Supp. III) 7701(a), contending that the agency decision was not supported by a preponderance of the evidence, was effected without proper procedures, was unduly harsh, and was based on age discrimination in violation of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a) (AR II 1). A Board field office affirmed the agency action and rejected petitioner's age discrimination claim (AR II 355-363); the Board denied the petition for review (Pet. App. 11-12).

Petitioner then sought judicial review in the United States Court of Appeals for the Ninth Circuit, asserting that his removal was based on age discrimination; in addition, he argued that his removal was arbitrary and capricious and violated certain procedural requirements. The court of appeals dismissed the petition for review and transferred the action to the United States District Court for the Western District of Washington (Pet. App. 1-2). The court of appeals held that because petitioner had raised a claim of discrimination under the Age Discrimination in Employment Act of 1967, the case fell within the coverage of 5 U.S.C. (Supp. III) 7702. Thus, the court concluded that judicial review of the action would have to begin with the filing

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[1] "AR II" refers to volume two of the administrative record filed in the court of appeals.

of a complaint in the appropriate district court pursuant to 29 U.S.C. 633a(c). See 5 U.S.C. (Supp. III) 7703(b)(2).[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. Except in "[c]ases of discrimination" (5 U.S.C. (Supp. III) 7703(b)(2)), the decisions of the Merit Systems Protection Board are subject to review in the courts of appeals or the Court of Claims. 5 U.S.C. (Supp. III) 7703(b)(1). In "[c]ases of discrmination subject to the provisions of [5 U.S.C. (Supp. III) 7702]," however, an employee may obtain judicial review only by filing an action in an appropriate district court. 5 U.S.C. (Supp. III) 7703(b)(2). Section 7702 is applicable whenever an employee:

> (A) has been affected by an action which the employee may appeal to the Merit Systems Protection Board, and
>
> (B) alleges that *a basis* for the action was discrimination prohibited by * * * the Age Discrimination in Employment Act of 1967 * * *.

5 U.S.C. (Supp. III) 7702(a)(1) (emphasis added).

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[2] The district court eventually dismissed the case without prejudice because "[s]ervice upon respondent has not been accomplished in accordance with F.R. Civ. P. 4(d)(4) and (5)" (Pet. App. 4-5). On September 3, 1981, petitioner filed a notice of appeal from the dismissal. Petitioner asserts that the dismissal without prejudice invalidated an Act of Congress and is therefore appealable to this Court under 28 U.S.C. 1252. See Pet. 4. This claim is frivolous.

In the proceedings before the Board and in the court of appeals, petitioner maintained that his dismissal had been based on age discrimination.[3] This is therefore a case of discrimination subject to the provisions of 5 U.S.C. (Supp. III) 7702. Accordingly, petitioner may obtain judicial review of the Board's decision only by filing an action in an appropriate district court. 5 U.S.C. (Supp. III) 7703 (b)(2); see 29 U.S.C. 633a(c).[4] There is nothing in

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[3] Following the Ninth Circuit's decision in this case, petitioner indicated that he had no intention of proceeding in the district court, as the court of appeals had suggested (see Pet. 14-15). Petitioner did not, however, abandon the age discrimination claim; his refusal to proceed in the district court seems to have been based entirely on the belief that he was entitled to review of the claim in the court of appeals. See Petition for Reconsideration at 4-6. Contrary to petitioner's apparent contention (Pet. 21-22), his refusal to file a complaint in the district court does not affect the nature of the case.

[4] Initial district court review of cases involving claims of discrimination preserves the right of the employee to a de novo trial on the discrimination aspect of his case. See generally *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). As the Senate Report on the Civil Service Reform Act of 1978 explains:

> District court is a more appropriate place than the Court of Appeals for these cases since they may involve additional fact-finding. Furthermore, discrimination complaints involving employees outside the Federal government are now considered by U.S. District Courts. To encourage uniformity in judicial decisions in this area both kinds of cases should continue to be considered by the U.S. District Court.

S. Rep. No. 95-969, 95th Cong., 2d Sess. 63 (1978), quoted in *Wiggins* v. *United States Postal Service*, 653 F.2d 219, 221 (5th Cir. 1981).

the language or history of Section 7703(b) to support petitioner's apparent contention (Pet. 19-21) that in a "[c]ase[] of discrimination," the employee has the option of seeking judicial consideration of his discrimination claims in either the court of appeals or the district court. The only other court of appeals to address this question has agreed that a case of discrimination is initially reviewable only in the district court and not the court of appeals. *Wiggins* v. *United States Postal Service*, 653 F.2d 219 (5th Cir. 1981).

2. Although the Board's decision in this case rejected all of petitioner's claims, not merely his age discrimination claim, the statute nonetheless specifies that petitioner must seek review in the first instance in the district court. As already noted, "[c]ases of discrimination subject to the provisions of [5 U.S.C. (Supp. III) 7702]" include any case in which "a basis" of the challenged adverse personnel action is alleged to be age discrimination.[5] It is immaterial for purposes of review whether the employee asserts other grounds for challenging the adverse agency action. As the Fifth Circuit observed (*Wiggins* v. *United States Postal Service*, *supra*, 653 F.2d at 222): "the statutory language should be read literally, that is, to vest initial jurisdiction in the district courts over any 'case' in which an employee alleges discrimination as 'a basis for the action.'"

---

[5] The Conference Report on the Civil Service Reform Act of 1978 describes those cases governed by 5 U.S.C. 7702, as "cases involving any action that could be appealed to the MSPB and which *involve an allegation* of discrimination * * *." H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 140 (1978) (emphasis added).

The plain language of the statute is supported by considerations of judicial economy. If claims such as petitioner's could be bifurcated, the district court and the court of appeals might simultaneously be presented with challenges to the same adverse personnel action, even though either court could afford complete relief. *Wiggins* v. *United States Postal Service*, *supra*, 653 F.2d at 222. Congress sensibly determined to centralize the litigation in the district court in any case involving a claim of discrimination, with review thereafter available in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1981

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Petitioner's Reply Brief

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No. 81-464

In The

Supreme Court of the United States

October Term, 1981

PAUL vox MINDEN, Former Federal Scientist,
Petitioner,

vs.

NUWES, an Agency of the United States government, Department of the Navy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

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No. 81-464

o

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

o

REPLY BRIEF TO BRIEF IN OPPOSITION

o

Submit Reply Brief in accordance with S.Ct. rule 22.5 addressing arguments first raised in this court in the Respondent's Opposition Brief, received on October 22, 1981.

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Kinsella v United States, 361 U.S. 234, 80 S.Ct. 297, 4 L Ed. 2d 268

George Moore Ice Cream Co v Rose, 289 U.S. 373, 53 S.Ct. 522, 77 L Ed. 1265

Wisconsin v Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L Ed. 2d 515

Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L Ed. 2d 935

S T A T E M E N T

Three arguments first raised in this Court in Respondent's Brief in Opposition, follow:

1. The reason the petitioner sought review of the (removal) action before the Merit System Protection Board and also before the United States Court of Appeal for the Ninth Circuit.

2. Allegation by the Respondent that the Petitioner - "alleges that a basis for the (removal) action was discrimination".

3. That the decision of the Court of Appeals is correct and does not conflict with any decision of this Court or of another Court of Appeals.

———o———

A R G U M E N T

The following three replies address Arguments first raised in the Respondent's Brief in Opposition as correspondingly described under the paragraph"Statement".

1. The reason the petitioner filed the appeal with the Merit System Protection Board can be restated from the opening remarks at the hearing (page 6 Adm. Rec II) to allow "declaring of my innocence of the allegation...".

Also filed for judicial review acting in self-defense under 5 U.S.C. 7703(c) and in the opening brief before Court of Appeals stated precise relief sought: " Petitioner moves the court to overturn the ruling of the Agency and declare the employee innocent".

The statement by the Respondent on page 2 of the Brief in Opposition, at best constitutes careless paraphasing.

2. The Respondent claims that "petitioner sought judicial review in the United States Court of Appeal for the Ninth Circuit, asserting that his removal was based on age discrimination ...".

The petitioner plainly did not make that statement. Rather the respondent keeps stating this: over a half dozen times in the Brief in Opposition submitted to this Court, although it constitutes a careless and misleading statement.

The cases cited by the respondent in the Brief in Opposition deal with Respondent's manufactured issue of Age Discrimination, constituting irrelevancies in this case of denial of due process.

The respondent in note 3 on page 4 of the Brief in Opposition seems to gloat in the fact that "Following the Ninth Circuit (initial) decision in this case, petitioner indicated that he had no intention of proceeding in the district court (with case of Age Discrimination)..."

That statement clearly was intended to be in petitioner's first reply to the motion for Dismissal by the Respondent. However Respondent knows the reason why. Although the call from my father saying that : "My mother died" on April 7, 1981 may not be a legal reason for omitting that simple statement, petitioner intent has been consistent: seeking judicial review to set aside agency action and declare the employee innocent.

The petitioner challenges the respondent to cite where these words "removal was based on Age Discrimination" were conveyed in written or spoken history, by petitioner.

Rather Age Discrimination Process forms another example of bad faith, along with Health, Safety and other work violations, that illustrates intent of People at Agency.

. The right to an opportunity to present every available defense is what petitioner seeks, within context of adjudicating the employee, not prosecuting the Agency.

3. The actions of the Court of Appeals does conflict with this Court and other Courts by voiding the former federal employee's right to judicial review and to be heard, allowing employee to declare his innocence by presenting petitioner's case.

The following Cases support the law, title 5 U.S.C. 7703(c) as described as follows :

Wisconsin v Constantineau, 400 U.S.433, 91 SCt 507, 27 L Ed.2d 515 :

Notice and an opportunity to be heard are essential on the basis of procedural due process, where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him.

Wolff v McDonnell, 418 U.S.539, 94 SCt 2963, 41 L Ed.2d 935 :

The touchstone of due process is protection of the individual against arbitrary action of government.

Re: Gault, 374 U.S.1, 87 SCt 1428, 18 L Ed.2d 527

Due Process of Law is the primary and indispensable foundation of individual freedoms; it is the basic and essential term in the social compact which defines the right of the individual and delimits the power which the state may exercise.

Hammond Packing Co. v Arkansas, 212 U.S.322, 29 SCt 370, 53 L Ed.530

The fundamental guaranty of due process is absolute and not merely relative.

Griffin v Griffin, 327 U.S.220, 66 SCt 556, 90 L Ed.635

Due Process forbids any exercise of judicial power which, but for the Constitution infirmity would substantially affect a defendant's right.

George Moore Ice Cream Co v Rose, 289 U.S.373, 53 SCt 522, 77 L Ed.1265

Due Process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgement.

Kinsella v United States, 361 U.S. 234, 80 SCt 297, 4 L Ed.2d 268

Due Process has to do with the denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise.

———o———

C O N C L U S I O N

The petitioner - Appellant acting in self-defense prays for issuance of a Writ.

Respectfully Submitted,

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